STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2004
v	No. 250801 Calhoun Circuit Court
ANDREW ALLEN WESNER, Defendant-Appellant.	LC No. 01-000737-FC

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a), and two counts of criminal sexual conduct in the second degree (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a). Defendant was sentenced to thirty to fifty years' imprisonment on the CSC I counts, and 142 to 270 months' imprisonment on the CSC II counts. Defendant argues on appeal that the trial court erred when it instructed the jury on hiding resulting in unfair prejudice to defendant, and also that the trial court erred when it calculated defendant's sentencing guidelines. Because after reviewing the record, we are not persuaded by defendant's arguments, we affirm.

Complainant, who was ten years old at the time of trial, testified that during the period of summer 1999 through summer 2000, defendant, her father, placed his penis in her mouth and forced her to perform fellatio on him, performed cunnilingus on her, and penetrated her vagina with his finger. Both the prosecutor and defendant stipulated that a physical examination of the complainant resulted in no findings. Defendant did not testify at trial.

Defendant first argues that the trial court reversibly erred when it instructed the jury on hiding because the instruction had no basis in the evidence and misled the jury. Errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A reviewing court examines the jury instructions as a whole, and reversal is only required when the jury instructions fail to protect a defendant's rights by unfairly presenting the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Defendant's conviction may not be set aside unless it affirmatively appears that the error resulted in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 491-492; 596 NW2d 607 (1999). The burden rests on defendant to establish that any error resulted in a

miscarriage of justice. *Id*. at 493-494. And to meet that burden, it must be "shown that it is more probable than not that the error was outcome determinative." *Id*. at 495-496.

At trial, Sergeant Scott McDonald testified that he had received a tip that defendant was at his apartment. McDonald and another officer went to defendant's apartment and when they arrived were greeted by Sharon Wintersteen who told the officers that defendant was not in the apartment. McDonald asked if the officers could come in and look around and Wintersteen allowed the officer to enter the apartment. The officers looked around and discovered that the bathroom door was locked. McDonald testified that "after a period of time, [defendant] came out of the bathroom and he was arrested."

Based on this testimony, the prosecution requested the jury to be instructed on flight. Defense counsel argued against the instruction at trial. After hearing arguments on the issue, the trial court stated that the evidence "could be interpreted entirely innocently, but there is, within it, also, . . . some basis for which the jury to conclude, if it chooses to do so, that there was at least an initial attempt to hide at the point of arrest" and decided to instruct the jury on flight.[1]

Evidence of flight is admissible to prove consciousness of guilt, although such evidence on its own is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The facts here, that defendant was in the bathroom with the door locked when the police initially entered his apartment, without more, is not enough to raise an inference that defendant was hiding from the police or was in any way intent on evading capture. Therefore, after considering the record evidence, we find that the trial court improperly instructed the jury on flight.

However, the burden rests with defendant to establish that any error as a result of the errant instruction resulted in a miscarriage of justice. *Luckity, supra*, 460 Mich 493-494. Again, to meet that burden, defendant must show "that it is more probable than not that the error was outcome determinative." *Id*. at 495-496. Defendant has not met that burden. A review of the record evidence overwhelmingly shows that defendant is guilty beyond a reasonable doubt of the crimes for which he was convicted. Therefore, because we conclude that defendant has failed to show any prejudicial or actionable error, defendant's argument is unavailing.

Defendant also challenges the trial court's scoring of his sentencing guidelines, specifically, Offense Variable 8 (OV-8) and Offense Variable 11 (OV-11). Although we review for clear error the trial court's factual findings at sentencing, we will uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We note that defendant preserved his objections to the scoring as required by MCR 6.429(C).

Defendant contends that he is entitled to resentencing because the court's scoring of OV-8, asportation of the victim to a place of greater danger, was clearly erroneous as a matter of law.

[1] CJI 2nd 4.4.

In calculating OV-8, a court must assess fifteen points if the victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a); *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003).

A sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score. *Hornsby, surpa,* 251 Mich App 468. A scoring decision for which there is any evidence in support will be upheld on appeal. *Id*., citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Here, there is evidence in the record that supports the trial court's scoring of OV-8. There is evidence on the record that on at least three separate occasions, defendant moved the complainant to a place of greater danger away from other adults. On one occasion, the complainant was outside playing with her siblings when defendant called her inside to do some cleaning, but instead took the complainant into the bedroom and bolted the door shut and assaulted the complainant. On another occasion, when defendant's girlfriend was bathing complainant and her two siblings, defendant insisted on rinsing the soap out of the complainant's hair. After an argument, defendant's girlfriend took the other two children out of the bathroom, and once defendant had the complainant alone, closed the door and took off his clothes whereafter he assaulted complainant. In a separate instance, when defendant had all three children alone in the car, defendant forced the complainant to come to the front seat while he was driving and again assaulted the complainant.

In each of these instances, defendant took action to seclude defendant to an area away from other adults or possible intervention, thereby asporting her to a place of greater danger or a situation of greater danger. Because the record contains some evidence to support the trial court's decision, we conclude the trial court did not err in scoring OV-8 at fifteen points. *Babcock, supra*, 469 Mich 264-265; *Hornsby, supra,* 251 Mich App 468.

Defendant also contends that he is entitled to resentencing because the court's scoring of OV-11, criminal sexual penetration, was clearly erroneous as a matter of law. Initially, at sentencing, the trial court scored OV-11 at fifty points and OV-13 at twenty-five points.[2] During a motion for resentencing the trial court struck the twenty-five points in OV-13 because the instructions for OV-13 state that "[e]xcept for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12." After the change in defendant's OV total, a reduction of twenty-five points leaving defendant with a total OV score of ninety, the trial court denied the motion for resentencing stating that his sentence would have been the same.

After reviewing the testimony offered at trial, we do not agree that the trial court erred in scoring OV 11 at fifty points because the evidence established at least three penetrations during a

[2] The offenses were committed in this case prior to the enactment of 2000 PA 279, effective October 1, 2000, adding a fifty-point category where the offense was part of a pattern of three or more sexual penetrations against a person under the age of 13. The new paragraph was labeled (1)(a) and the former paragraphs were renumbered accordingly as (1)(b)-(f).

single incident. *People v Matuszak*, ___ Mich App ___; ___ NW2d ___ (Docket No. 244871, issued 7/13/04). The complainant's testimony regarding the first assault described fellatio, cunnilingus, and digital penetration. Because the record supports a finding of three penetrations during a single incident, a score of fifty points for OV 11 is appropriate. Because no error occurred and there has been no change to defendant's OV score, he is not entitled to resentencing and MCL 769.34(10) requires that we affirm.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood